EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4122617/2018

Preliminary Hearing Held at Glasgow on 7 March 2019

Employment Judge McFatridge

Ms Laurette Leach	**Claimant** **Represented by:** **Mr Beardsell** **Friend**
Seaforth Hotels Limited trading as Knockderry Country House Hotel	**Respondents** **Represented by:** **Mr Hendley** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that

1. the correct designation of the respondents is Seaforth Hotels Limited trading as Knockderry Country House Hotel, Shore Road, Cove, Argyll & Bute G84 0NX;
2. the claimant did have sufficient qualifying service to make a claim of unfair constructive dismissal in respect of Section 94 of the Employment Rights Act 1996;
3. the claimant's claims will proceed to a hearing on a date to be fixed.

REASONS

E.T. Z4 (WR)

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondents. She claimed that she had suffered an unlawful deduction of wages and that she was due notice pay following the termination of her employment. The respondents submitted a response in which they denied the claims. They stated that the claimant had insufficient qualifying service to make a claim of unfair dismissal. The initial claim was raised against "Knockderry Country House Hotel". In their ET3 response the respondents indicated that their proper designation was Seaforth Hotels Limited albeit they traded as Knockderry Country House Hotel. On 8 February 2019 the Tribunal directed that a preliminary hearing take place in order to determine the following preliminary issues namely

   (i) length of service

   (ii) identity of the respondents.

2. At the hearing evidence was led on behalf of the respondents from Murdo Macleod one of their Directors, Elizabeth Macleod another of their Directors, Jen Darcy their General Manager, Ann Lenting a former employee and Karen Hetrick the respondents' Housekeeper. The claimant gave evidence on her own behalf. The parties each lodged various documents. Neither of the bundles was indexed or properly paginated. I have referred to the documents lodged by the claimant as C1-C8. I have endeavoured within the text to identify the particular page of each document which I am referring to. The respondents lodged two bundles. I have referred to the first bundle by page number using the prefix R for respondents. Much of this bundle was not actually referred to during the hearing. The respondents also lodged another unpaginated bundle of documents E1-E20 (including E9A). Again I have referred to these by document number and attempted to identify the page when referring to. On the basis of the evidence and the productions I found the following facts relevant to the preliminary issues I had to determine to be proved or agreed.

Findings in Fact

3. The correct designation of the respondents is Seaforth Hotels Limited trading as Knockderry Country House Hotel. The respondents operate the Knockderry Country House Hotel which is a small 15 bedroom hotel situated in Cove. As well as having 15 letting bedrooms the hotel has a dining room and puts on functions such as weddings. Mr and Mrs Macleod who gave evidence are Directors of the respondents and work in the business. In addition they have a number of staff. Many are part time but usually they will have around 17 to 18 staff.

4. On Sunday 28 August 2016 the claimant went for lunch at the hotel with friends. Towards the end of the meal one of the claimant's friends approached Ann Lenting who was the respondents' Duty Manager on duty at the time. She indicated that the claimant would be interested in a job if there were any going at the hotel. Ms Lenting said that she would speak to Murdo Macleod one of the Directors of the company. The claimant told Mr Macleod she was interested in a post of General Assistant which the hotel had advertised. Mr Macleod took her details including her telephone number and e-mail. He asked the claimant to send her CV to the General Manager. The claimant indicated that she would do this and would be available for interview.

5. The claimant e-mailed the respondents on 30 August 2016 forwarding her CV (E1). On 31 August the respondents' then manager e-mailed the claimant asking her if she could come in for interview at 1:00pm on 1 September. The claimant duly attended for interview.

6. It is the respondents' usual practice when hiring new staff to offer what they term a trial shift. This is where the potential employee comes in and is shown the work which they will be doing. It gives the employee the opportunity to gauge whether or not the work will suit them. It also gives the respondents an opportunity to see if the employee is likely to be suitable for the job. The job which the claimant would be doing was that of General Assistant. Initially at least her main task would be cleaning and setting up rooms after guests had left. The Respondents are aware this is physically demanding work which does not suit every-one. The respondents require

this task to be done to a particularly high standard to suit their customer base.

7. It is the respondents' usual practice to pay a potential employee for the trial shift whether they are taken on or not. The main reason for this is that the respondents' hotel is a few miles out of Cove and the bus journey there and back costs several pounds. Over the years the respondents have become aware that the bus fare can be a significant outlay for some potential employees who are on benefits and they feel it is fair to pay for the trial shift.

8. On 3 September the claimant received a phone call from the respondents' housekeeper Ms Hetrick. She asked if the claimant could come in later that day. The claimant attended at the hotel. Ms Hetrick had been Head Housekeeper for a number of years. When she had first started at the hotel as a General Assistant she had had to undergo a one week training course before she was able to work in the rooms. Ms Hetrick saw the trial shift essentially as a "meet and greet" for the new employee. The new employee would not be expected to work but simply to observe Ms Hetrick working and be introduced to the layout of the building and some of the staff.

9. As mentioned above the respondents require their rooms to be prepared to a high standard. Ms Hetrick wanted to point this out to the Claimant and also wanted to make clear to the claimant that doing rooms is extremely physically demanding. Ms Hetrick would not allow the claimant to do any work herself. In particular, the job involves using cleaning materials some of which are chemicals. Ms Hetrick was of the view that it would not be safe to allow someone to use these cleaning materials without an element of training. Ms Hetrick had seven rooms to do. Whilst the claimant was there Ms Hetrick did two rooms. The claimant did not assist. Ms Hetrick then took the claimant to the still room and told her to have a cup of tea there.

10. A member of staff had phoned in sick that morning but Ms Hetrick had absolutely no difficulty in doing the seven rooms herself. She took the claimant through the hotel and talked her through how rooms would be

done. She explained her own particular system for doing this. The claimant did not do any actual work.

11. The claimant was then told that she would be contacted and advised when her training would commence. The claimant was then contacted and did her first shift on 8 September. Some of this was training but the respondents had a large wedding coming up and for some of the time the claimant was "mucking in" along with the other staff in preparing for this.

12. On 9 September the claimant did a further shift. During this shift she completed a starter form. This is used by the respondents for new staff. It asked the claimant for things like her date of birth and National Insurance number. The claimant signed this on 9 September 2016. The document was lodged (E3). It gives the employment start date as being 9 September 2016.

13. The respondents have a system called PlanDay which is used for recording employees' hours and is used for calculating pay roll. The claimant required to get a login for PlanDay before her hours could be recorded. She got this on or about 9 September. On 28 September Mr Macleod a Director of the company e-mailed one of the respondents' employees responsible for pay roll to advise that after submission of the PlanDay information the claimant had provided her with a note confirming that she had worked on 3 and 8 September. This was not in PlanDay. There was an exchange of e-mails (E6). The upshot of this was that the claimant was paid for the two hours she had been in on 3 September and for the shifts she had worked on 8 and 9 September.

14. Initially the claimant was paid at the end of each month on the basis of hours worked in that month. It was the respondents' usual practice to provide employees with a statement of terms and conditions confirming this together with the other information required in terms of the Employment Rights Act. The general form of the statement used was lodged (E14).

15. Although neither party could trace it I accepted that it was more probable than not that the claimant had been provided with such an "hourly paid" statement of terms and conditions in the style of E14 at some point during the first month or so of her employment. In terms of this the claimant was due to be paid for the hours actually worked by her at the rate of the National Minimum Wage. The Claimant worked on this basis until she signed a new contract in August 2017.

16. The respondents are a seasonal business and this means that employees are generally required to work more hours during the summer months than in the winter. This can cause problems for employees and the respondents operate a system of annualised hours for some staff. There is a dispute between the parties as to how this system worked and given that a future Tribunal will require to rule on this issue I need only say for the present purpose that the claimant received a new statement of terms and conditions setting out her employment on the basis of an annualised hours contract in or about August 2017. The claimant was told that her role under this contract began on 7 August 2017. The claimant signed this document on 15 August 2017 and it was signed on behalf of the respondents on 16 August 2017. A copy of the document was lodged (E15). Despite the fact that the Claimant had signed a new contract there was no break in the continuity of the Claimant's employment in the changeover from one method of payment to the other.

17. As noted above the precise effects of this change and its impact on the claimant are disputed however suffice to say that the respondents' understanding was that an employee such as the claimant would be paid the same amount each month based on what their hours were expected to be over the year divided by 12. It was anticipated that during the winter months the employee would work less hours than the yearly average but would be paid on the basis of the yearly average. They would therefore be paid more than they had worked for during the winter. The expectation was that during the summer they would work for more hours than the average and that by the end of the year they ought to have worked the number of hours they were supposed to. It is the respondents' position that the

contract provided them with various opportunities to resolve a situation where an employee had worked less hours than they had been paid for and needed to either work additional hours or receive less pay. Given that the next Tribunal will have to deal with these issues I will say no more about it other than that the respondents' General Manager, Ms Darcy, would appear to have carried out some sort of quick review of the annualised hours staff had worked at some point in July 2018.

18. On 23 July Ms Darcy the General Manager wrote to the claimant stating

> "Just a quick note to say that I've completed a review of all annualised hours staff and will look to schedule some time with each of you individually to discuss. No cause for concern, I just want to ensure we are all on the same page about how many hours are remaining for the year.
>
> I will be in touch to let you know when we will sit down together to discuss.
>
> If you have any questions or issues you would like to raise with me, this would be the perfect time to do so. Please have a think about anything you would like to add to our 'agenda. I would be grateful if you could inform me of this beforehand so I can look into any issues to which I may not immediately know the answer."

19. The claimant had access to her pay records including a note of hours worked through the respondents' DayPlan system. I should also record at this stage that although it is a matter which will require to be determined at a future hearing, it is the claimant's position that at this stage she did not know what her hourly rate was supposed to be.

20. Although Ms Darcy had advised the claimant on 23 July that she would arrange a meeting with all annualised hours staff individually she had not arranged a meeting with the claimant by 14 August. During the period from 23 July to 15 August the hotel was very busy. The claimant approached Ms Darcy on at least one occasion over this period to ask about her hours. By this time Ms Darcy had looked at the figures and was aware that the

claimant was in deficit by a fairly substantial number of hours. Her view was that the respondents would want the claimant to work these hours off over a substantial period of months. She anticipated that it might be a difficult conversation. She felt that there was no point in having a one or two minute chat with the claimant or giving the claimant a figure without the context and without discussing how to resolve the situation. Her main reason for doing this was she did not wish to cause alarm to the claimant by giving her a figure without at the same time being in a position to reassure her that the respondents would be happy for the deficit to be worked off over time. She felt it would not be helpful to just give the claimant a number and leave. In any event, her view was that if the claimant wanted to know then she could certainly work things out herself since she had a copy of her statement of terms and conditions and had a note of her hours and pay from the DayPlan record.

21. Ms Darcy e-mailed the claimant on 14 August 2018 stating

> "Hi Laurette,
> Hope you're well!
> I have been looking at dates for us to sit down and discuss your hours. Beth and Murdo are away at various points over the next fortnight but I know they would both like to join us. Would you please send me your availability for the week commencing the 27th of August? I will then confirm the meeting date and time with you, Beth and Murdo."

22. On 15 August the claimant e-mailed Ms Darcy stating

> "Dear Jennifer
> It's almost a month ago, that we were to chat re: "annualised hours review"
>
> 1. my calculations show that I'm owed hours
> 2. your calculations indicate that hours of work have been lost perhaps because of scheduling regarding my availability
> 3. you propose less hours at a reduced rate
>
> thus there are 4 scenarios as follows –

- less hours @ less pay = 21 x minimum wage (laundry manager's)
- more hours @ less pay = 40 or 35 @ less than minimum wage (senior housekeeper's)
- less hours @ more pay = 26.4 x & 7.70 (my current contract)
- more hours @ more pay = 41 x 8.75 (duty manager's rate)

the restraints of your budget might be 50K; so I resign.

My last day will be Wednesday 05 September 2018."

23. The respondents replied to the claimant's letter of resignation on 16 August stating

"Thank you for your resignation. We accept your final date of work as the 5th of September.

As per my previous message, please advise of your availability during the week commencing the 27th of August to discuss your hours."

24. After some to-ing and fro-ing a meeting was arranged for 30 August. The meeting took place and was attended by the claimant. Ms Darcy and Beth Macleod represented the respondents. Ms Darcy produced a note of the meeting which was lodged (E11). I consider this to be an accurate record. The discussion was around the fact that since the claimant was now leaving it would not be possible for her to pay the outstanding money she owed over a period of time. This meeting ended on the basis that the claimant would attend a further meeting at which Mr Macleod would be present the following day. A further meeting took place the following day. It was attended by the claimant together with Jennifer Darcy and Mr Murdo Macleod. Ms Darcy took a handwritten note of the meeting which was lodged (E13). This was a contemporary note of the meeting. Ms Darcy also produced minutes which were lodged (E11). I considered the minutes to be reasonably accurate but not complete. At the end of the meeting the claimant indicated that she would be leaving the hotel and would not be coming back. Mr Macleod walked the claimant out to her car and they shook hands. It was plain to Mr Macleod and Ms Darcy that the claimant was not returning.

Mr Macleod joked about the claimant doing some rooms before she left and the claimant shared the joke.

Discussion and Decision

25. I found the evidence of the respondents' witnesses to be both credible and reliable. All of them gave their evidence in a patently truthful manner and genuinely tried to give full answers when they were asked questions in cross examination. Their answers were in line with the contemporary documents. I was less impressed with the evidence of the claimant. It was clear that she has a sense of grievance. Many of her answers seemed to be designed to assist her case rather than truthfully answer the question. At the end of the day there was actually substantial agreement between the parties as to the factual matrix as to what had occurred. There were still however a number of matters of dispute.

26. With regard to the identity of the employer it became clear at the outset of the case that the only reason that the claimant was not prepared to accept that the respondents were Seaforth Hotels Limited was because both the claimant and her agent misunderstood the concept of legal personality. The claimant and her representative were of the view that because most people in the area knew the hotel as the Knockderry House Hotel or Knockderry Country House Hotel that this must be the designation of the respondents. Once I explained to the claimant's representative that the claim could only proceed against an entity with legal personality and that it was not possible for the employer to be simply an address then the claimant accepted that the correct respondents would be Seaforth Hotels Limited trading as Knockderry Country House Hotel. Given that this was also the respondents' view I felt that I need explore the matter no further. In any event it was clear from both draft contracts that were provided that this was the name of the employer given to the claimant and that the respondents operated the hotel at which the claimant worked. The first part of the preliminary hearing was therefore effectively dealt with by agreement.

27. With regard to the second point there was a dispute regarding both the start date and the end date. With regard to the start date the claimant's evidence was in stark contrast to that of the respondents' witnesses Ms Hetrick. The claimant's position was that she had helped Ms Hetrick make beds and had been down on her hands and knees cleaning the room. She said she also cleaned bathrooms. Her position was that she didn't remember exactly what she had been doing but remembered being on her knees working in Room 2. She confirmed she was only there for two hours and then left. I preferred Ms Hetrick's evidence on the subject. Although she is still employed by the respondents I did not think she had any good reason to tell lies for her employers. Everything she said had a patent ring of truth about it. I also considered she made good points about not allowing a new start to use chemical cleaning materials until they had been trained. It also appeared to me that Ms Hetrick had a very strong pride in her work and that for this reason it is unlikely that she would have set the claimant to work straight away without giving her some training in the way that she wanted things done. On the other hand I felt that the claimant's evidence was very much tailored to advancing her case in that she thought that it was important to establish that she had been carrying out genuine work on 3 September. At the end of the day as noted below although I have preferred the evidence of the respondents my view is that this is not all that relevant and I accepted the claimant's assertion that 3 September was the first day of her employment. I have set out my reasons for doing this below. At the end of the day however I did feel that this was one of the matters where the claimant was trying to improve her case by giving evidence that she felt would suit her position rather than her honest recollection. It was also the claimant's position that she had tried to discuss matters with Ms Darcy on several occasions between 23 July when Ms Darcy raised the subject of the hours owed and 15 August when the claimant resigned. I did not accept this evidence. I preferred Ms Darcy's evidence to the effect that the claimant had spoken to her once and that Ms Darcy had dealt with it as stated. I also accepted Ms Darcy's evidence as to the reason why she did not wish to give the claimant a simple figure in that conversation but wanted to have a proper meeting with her. The claimant's evidence as to her understanding of the annualised hours' system was extremely vague and I

again believed that she was giving evidence that she thought would suit her case rather than reflective of her genuine recollection.

28. Again, although nothing much turns on this I accepted the evidence of the respondents that they would have given the claimant a copy of the standard hourly paid statement of terms and conditions (E14) at the outset of her employment or shortly thereafter.

29. There was some evidence in relation to the issue of whether or not the claimant was covertly recording the two meetings she attended on 30 and 31 August. I did not feel that this was a matter I required to adjudicate on. My view was that Ms Darcy was giving truthful evidence in respect of both meetings and that the notes which he produced were substantially correct. I also accepted the evidence of Mr Macleod and Ms Darcy that at the end of the second meeting it was absolutely clear that the claimant was leaving and not coming back. The claimant also confirmed this in her own evidence that she had indicated she was not coming back.

30. Dealing with the subject of evidence I should also say that during the hearing the claimant's representative sought to lead substantive evidence about the claimant's suggestion that her resignation was in fact a constructive dismissal. I did not feel that this was evidence which I required to hear at this stage. As noted below s97 applies where an employee has terminated the employment. For the purpose of determining qualifying service I did not require to make a finding that there had been a constructive dismissal. Whilst, clearly, an employee who resigns cannot claim unfair dismissal unless their resignation amounts to a constructive dismissal this is not a matter which I required to adjudicate on at the preliminary hearing. It will require to be decided at the final hearing.

31. I should also say there was some discussion at the hearing about whether or not the claimant had given the appropriate period of notice when she resigned initially on 15 August. The terms and conditions indicates that the claimant was required to give four weeks' notice where her service, as here was between one month and four years. The respondents' position was

that the claimant had given less notice than this but that in practical terms there is not an awful lot an employer can do in that situation and they were therefore perfectly happy to accept the notice as expiring on 5 September. The claimant's position was that she had chosen 5 September as the date by giving four weeks' notice and then deducting from this the number of days' holiday which she considered she was entitled to (10). This was part of the line of evidence from her designed to show that in actual fact her employment had continued up to 15 September so as to give her two years' service even if I found that her start day was 8 September. I rejected the claimant's evidence on this point. It appeared to me that this was something that she had clearly dreamt up afterwards in an attempt to bolster her case. Although nothing turns on it I found that the contractual notice period was four weeks but that the parties had jointly agreed to a shorter notice period expiring on 5 September.

Discussion and Decision

32. As noted above both parties accepted that the correct designation of the respondents in this case is Seaforth Hotels Limited trading as Knockderry Country House Hotel.

33. The second question which I had to determine that the claimant had sufficient qualifying service to bring a claim of constructive unfair dismissal. The requirement for qualifying service is set out in Section 108 of the Employment Rights Act 1996. Section 1 is relevant and this states

> "Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."

Section 94 is the section of the Employment Rights Act which confers the right not to be unfairly dismissed. In computing continuous employment I am required to take into account the terms of Section 97 of the Employment Rights Act and in particular Section 97(4) thereof. This states

"Where –

(a) the contract of employment is terminated by the employee,

(b) the material date does not fall during a period of notice given by the employer to terminate that contract, and

(c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)).

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination."

34. In order to establish the period of continuous service I have required to identify the claimant's start date and also the effective date of termination as defined by Section 97.

Start Date

35. On the basis of the evidence I considered that the claimant's start date was 3 September 2016. Whilst I accepted the evidence of the respondents' housekeeper in preference to that of the claimant it appeared clear to me that the claimant had started work on that date. The claimant had attended for interview and she had been called in to start work. Although the respondents called this a trial shift it appeared to me that "trial" was being used in the same sense as the probationary or trial period which an employee often works on for the first month or three months of employment. Although the claimant did not do any physical work that day the claimant was clearly on the premises and acting under the instructions of the respondents via their housekeeper. She was paid. It appeared to me that all of the requirements of employment were met. The fact that the claimant still required training and was not able to do any actual useful work until she had completed that training does not in my mind change anything. It is often the case that an employee will require to go through an induction period for the first one or two weeks of employment. During that period they may not

be doing what their employers regard as work but nevertheless they are in employment and their period of continuous employment has commenced.

36. With regard to the date of termination of employment I am required to determine the Effective Date of Termination (EDT) which is a statutory construct defined in the Employment Rights Act. It may be different from the contractual termination date. I consider that before doing this I require to carry out an analysis of the facts. It is clear from the evidence that the claimant resigned in writing on 15 August when she sent an e-mail to the respondents confirming that she was resigning. She gave notice which was less than that required of her which was due to terminate on 5 September. This was an offer to shorten the period of notice and the Respondents accepted this offer when they wrote back confirming they accepted the date. Had matters taken their course then I would have found that the effective date of termination was 5 September.

37. Matters however did not follow a straightforward course and in my view it is clear from the evidence that there was a second resignation by the claimant on 31 August. The situation was that the claimant had met with Mrs Macleod and Ms Darcy to discuss the claimant's annualised hours. The problem was that according to the respondents the claimant was in deficit with these hours and if she was to be leaving on 5 September there was insufficient time to pay this off. This meant effectively that the claimant would not be paid for August. The meeting did not reach a resolution and the claimant met again with Mr Macleod the following day. At that meeting the evidence of all three was that the claimant indicated that she was leaving with immediate effect. Neither party could say exactly what was said by way of words of resignation but it was clear to me that at the end of the meeting all three present were aware that the claimant was leaving and was not coming back. The claimant's position as I understand it was that she was not prepared to return to work if she was not being paid for August and in fact would not be paid for any further work she was doing. It appears to me that there was therefore a further resignation by the claimant on 31 August. It is clear to me that this was a resignation by the employee. It is also clear to me that the claimant resigned with immediate effect which

meant that the material date was 31 August. This was the contractual end date. The Claimant clearly indicated she was no longer considering herself bound by the contract of employment from that date forward. For the purposes of calculating qualifying service however I have to use the EDT which is a statutory construct. I require to consider the terms of s97 of the Employment Rights Act.

38. While the Claimant's resignation fell during a period of notice given by the employee it did not fall during a period of notice given by the employer. It appears to me therefore that Section 97(4)(c) applies and that the effective date of termination for the purposes of Section 108 is the date that a notice given by the employer in terms of Section 86 would have expired had the notice been given on 31 August. In terms of Section 86 the claimant was entitled on that date to one week's notice. I say this on the basis that as at 31 August the claimant's period of continuous employment was less than two years.

39. What follows therefore is that if the employers had given notice on 31 August rather than the claimant then this notice would have expired on 7 September. It therefore appears to me that the effective date of termination taking into account the terms of Section 97 is therefore 7 September.

40. It follows from the above that my finding is that the claimant had been continuously employed from 3 September 2016 until 7 September 2018. That is a period of more than two years and therefore the claimant has sufficient qualifying service to bring her claim of unfair constructive dismissal.

41. Finally I should say that, as noted above, during the course of the hearing the claimant sought to lead evidence which related to the question of whether or not she had in fact been constructively dismissed. The claimant's representative indicated that his understanding was that the extension of time would only be available if the claimant was constructively dismissed. As one can see from the terms of Section 97(4) quoted above

it is not necessary for the claimant's resignation to be part of a constructive dismissal in order to extend the effective date of termination of employment. I have not therefore made any decision on this point. The issue of whether or not the claimant was in fact constructively dismissed or whether she simply resigned is a matter which will require to be determined by the Tribunal in due course.

Employment Judge **Ian McFatridge**

Date of Judgment **27 March 2019**

Entered in register and copied to parties **02 April 2019**